RECORD
AND
BRIEFS

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No. 16-74

In The

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL.,

Petitioners,

v.

MARIA STAPLETON, JUDITH LUKAS, SHARON ROBERTS, AND ANTOINE FOX,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY

Respondents dispute none of the following: The question presented is an important question of federal law. ERISA—a comprehensive federal regulatory scheme premised on national uniformity—currently applies differently to religious organizations in different circuits. The question presented affects millions of employees and hundreds if not thousands of religious nonprofits across the nation. The issue is recurring; indeed, an avalanche of class actions seek untold billions of dollars. The three relevant federal agencies for decades have rejected a church-establishment requirement, and countless religious organizations have relied on the agencies' interpretations. And three federal appellate courts have recently rejected the agencies' conclusions, upset what was a longstanding status quo, and created immense confusion.

This Court, not the lower courts, should have the final say on this important issue. And only this Court can resolve the disuniformity, which is causing massive upheaval in the administration of pension plans by religious employers. Time is of the essence, and further percolation will not assist this Court's resolution of the church-establishment question. The Court should grant certiorari.

I. The Court Should Decide the Church-Establishment Question Now

Respondents declare that "[t]his petition represents Advocate's attempt—in the face of consistent rulings (without dissent) by the only three courts of appeals to address the issue—to exempt its pension plan from ERISA." Opp. 1. That statement is untethered from reality. Advocate did not bring this

case, much less "attempt" to exempt its plan from ERISA "in the face" of contrary appellate authority. Advocate has maintained its ERISA-exempt church plan since at least 1980, and relied on two IRS opinions issued directly to Advocate. The only "attempt" here is respondents' attempt to disturb three decades of settled law and unchallenged administrative practice.

1. Respondents agree that, since 1983, the IRS, DOL, and PBGC have issued hundreds of opinions, letter rulings, and settlement agreements assuring church-affiliated employers that their pension plans are exempt from ERISA, regardless of whether a church established the plans. Pet. 7. Respondents suggest that these opinions are basically worthless—due no deference and unworthy of petitioners' reasonable reliance. Opp. 17-19. Not only does this reasoning contradict those agencies' own assurances (Pet. 16), it flies in the face of common sense. ERISA is a notoriously complicated, nationwide regulatory scheme. Organizations must be able to rely on the unanimous and longstanding opinions of the three federal agencies charged with interpreting that statute. And Advocate and countless other religious organizations like it undisputedly *have* relied on the opinions of these agencies for decades. Pet. 9-10, 17-18.[1]

The Third, Seventh, and Ninth Circuit decisions upset over thirty years of administrative practice.

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[1] Respondents suggest that PLRs apply only "*vis-à-vis* the IRS with respect to ... tax-qualification status." Opp. 18. But the PBGC follows the IRS (29 U.S.C. §1321(b)(3)) and a plan cannot be exempt from the IRS and PBGC-administered provisions but not the DOL provisions.

Respondents contend the courts were correct in refusing to defer to the decisions of the IRS, DOL, and PBGC. As an initial matter, the courts' criticisms of the agency statements are unfounded. As respondents note, the courts of appeals generally assert that the general counsel memorandum lacks analysis and "fails to consider the relationship" between subparagraphs (33)(A) and (C). Opp. 18. Not so. The general counsel memorandum explains that (C) modifies (A).

But regardless whether these agency rulings deserve deference—a merits question—they demonstrate the need for this Court's review. The IRS's 1983 memorandum has "been followed ... by the IRS, PBGC, and the Department of Labor." Opp. 17. The IRS and DOL have issued over 550 rulings applying the memorandum. Contrary to respondents' suggestion (Opp. 17 n.3), it is not only judicial invalidations of notice-and-comment regulations that invade reliance interests and warrant review. *E.g.*, *Morton v. Ruiz*, 415 U.S. 199 (1974) (BIA manual).

2. The five amici highlight the immediate and irreparable burdens at stake. Absent this Court's intervention, the court of appeals decisions will have a devastating financial effect on religious employers and plan participants. ERISA creates countless duties, rights, and requirements for plans and participants, sponsors, fiduciaries, administrators, and beneficiaries. Absent this Court's intervention, petitioners and other religious nonprofits within the Third, Seventh, and Ninth Circuits must restructure their plans to comply with ERISA. Opp. 22. Respondents say these are the requirements "Congress deemed necessary" (*id.*), but that is the ultimate question in this case. And while respondents con-

tend that certain plans have smoothly *ceased* complying with ERISA (Opp. 23), the burdens involved in *complying* with ERISA are much different.

Nor is it "speculation" (Opp. 24) that some church-affiliated employers will abandon their defined benefit plans due to the unsustainable costs of ERISA. It is a statistical inevitability. Pet. 20-21. Congress expanded the church plan exemption in 1980 precisely because "churches fear that many of the agencies would abandon their plans" given the "costs of complying with ERISA." 125 Cong. Rec. 10052 (May 7, 1979).

These burdens are the tip of the iceberg. Respondents allege that Advocate owes them billions of dollars in penalties—for just one year. Pet. 15. They now say such relief could be an "abuse of discretion" (Opp. 28), but tellingly do not offer to withdraw their demands. Regardless, religious employers could find themselves in violation of federal securities laws, giving rise to potential civil penalties and even criminal liability. Brief of Church Alliance as *Amicus Curiae* in Support of Petitioners 5-8.

The loss of church-plan status could also strip plans of their qualified tax status under § 401 of the Code, with disastrous consequences for *employees*. *Id.* at 10-11. For example, participants would be taxed on benefits when they are vested, rather than distributed; amounts in trust to fund retirement benefits would be reduced by income taxes on the trust's earnings; and participants would be unable to defer federal income taxes by rolling distributions over into an IRA or another qualified plan. *Id.*

It makes no sense to force religious organizations, courts, and federal agencies to muddle through

these questions now when the threshold question presented may render the entire enterprise unnecessary. More church plans are being sued, even since this petition was filed,[2] and respondents' counsel are advertising for new plaintiffs against new hospitals. If respondents' counsel have the time, energy, and resources to file dozens of class actions in nearly every circuit, and the matter is important enough to drain the resources of trial and appellate courts and religious nonprofits across the nation with litigation that could last decades, surely the sound administration of justice counsels for this Court's resolving the issue in one fell swoop.

3. Respondents claim that granting the petition will harm petitioners' employees. Opp. 22-25. But respondents present no evidence or plausible allegation that Advocate's Plan is underfunded (which it is not). A few more months of a 30-year-plus status quo pending this Court's decision is far less risky than fundamentally altering the pensions and benefits plans of thousands of employees.

Respondents assert that the interlocutory posture of this appeal makes the case unworthy of review. They contend the Court should permit their other claims—including for billions of dollars in penalties—to be adjudicated *before* the Court decides the church-establishment question. But ERISA coverage is a threshold question, no facts or further percolation would illuminate the question, and it is ripe for decision. That is why this case was certified for and resolved via interlocutory appeal. It makes no sense

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[2] *E.g.*, Complaint, *Mollet v. Hosp. Sisters Health Sys.*, No. 16-cv-9238 (N.D. Ill. Sept. 26, 2016); Complaint, *Holcomb v. Hosp. Sisters Health Sys.*, No. 16-cv-3282 (C.D. Ill. Oct. 11, 2016).

to litigate the pending claims below to then return to this Court to finally resolve a by-then-long-overdue issue. That is not in the interest of employees *or* employers. And Advocate mentioned the hundreds of millions in community benefits it provides (Pet. 22) not for comparison with secular nonprofit hospitals (Opp. 26-27), but because forcing any nonprofit hospital to engage in massively expensive and potentially unnecessary litigation harms patients.

4. Respondents do not dispute that this case squarely presents the church-establishment question. They rather contend that review of the question presented might not alter the result. Opp. 36. The Seventh Circuit disagreed, given that it stayed the mandate pending this petition. The presence of alternative grounds potentially supporting the judgment that have not been passed upon by the courts below hardly counsels for denial of certiorari; this Court regularly grants cases in such circumstances, including ERISA cases. *E.g.*, *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 242 & n.1 (2000). And the Court should grant certiorari because of the importance of a national resolution of the church-establishment question.

Respondents' alternative arguments are also meritless. Respondents contend that subparagraph (C)'s "principal purpose" requirement bars church-related organizations from using internal subcommittees (rather than external church-affiliated corporations) to administer their church plans. Opp. 36-37. The federal agencies unanimously disagree. *E.g.*, IRS Gen. Couns. Mem. 39,007, 1983 WL 197946, at *4 (July 1, 1983). Under the text, a church plan may be maintained by a church-affiliated "organization, *whether a civil law corpora-*

tion or otherwise, the principal purpose of which is the administration or funding of a [pension plan] for the employees of a church." 29 U.S.C. § 1002(33)(C)(i) (emphasis added). The emphasized words, which respondents omit in setting forth the statute (Opp. 36), establish that an internal, church-affiliated subcommittee with the requisite principal purpose can qualify.

Respondents also contend that the Plan is not maintained "'for' the 'employees' of a church" (Opp. 37), a phrase that includes employees of an organization "controlled by or associated with a church," 29 U.S.C. § 1002(33)(C)(ii). Respondents contend that Advocate is not "associated" with the Evangelical Lutheran Church of America (ELCA) and the United Church of Christ (UCC). Opp. 37. This argument is frivolous. The statute requires only that an organization "shares common religious bonds and convictions" with a church. 29 U.S.C. § 1002(33)(C)(iv). Advocate easily qualifies, for the reasons in the petition. Pet. 8-9. Respondents' assertion that the ELCA and UCC have no "role in the governance of Advocate" (Opp. 37) is false. Pet. 8. And while respondents cite factors discussed in *Lown* and *Chronister* (Opp. 37), those cases involved hospitals that *disclaimed* any association with a church.

II. Absent Review, ERISA Will Apply Differently In Different Circuits

Before respondents' counsel orchestrated these suits in 2013, *every* court to consider the issue had held or assumed that church plans need not be established by churches. Pet. 17. In this new wave of litigation, however, the lower federal courts have been "all over the map." Pet. App. 53a. The Seventh Circuit acknowledged that the question "is springing up

across the country" and has "divided" the district courts. Pet. App. 3a-4a. And the district court observed that numerous courts "have come to the opposite conclusion"—including the Fourth and Eighth Circuits and many district courts. Pet. App. 41a. These conflicting decisions severely undermine ERISA's goal of national uniformity and leave religious nonprofits and their plan participants in an untenable position of uncertainty. While respondents dispute the existence of a circuit split, they do not dispute that ERISA as a practical matter now applies differently in different circuits.

1. The Fourth Circuit declared that "a plan established by a corporation associated with a church can still qualify as a church plan." *Lown v. Continental Cas. Co.*, 238 F.3d 543, 547 (4th Cir. 2001). That sentence appeared in the portion of the Fourth Circuit's opinion in which the court outlined the requirements for church plan status. The Fourth Circuit then determined whether the plan at issue satisfied the requirements, and concluded that it did not. *Id.* at 548. That analysis would have been completely unnecessary if there were a church-establishment requirement. Nor is it true that the Fourth Circuit did not analyze the statute—it followed its rejection of a church-establishment requirement by quoting the text of subparagraph (C). That was explanation enough, because the IRS, DOL, PBGC, and Fourth Circuit reading of the statute is not complicated: Subparagraph (C) defines a church plan to "include" plans maintained by church-controlled or church-associated organizations. And the Eighth Circuit followed the Fourth Circuit in *Chronister*. Pet. 23.

But even if the holdings were dicta (Opp. 14), they are de facto controlling. District courts follow

these decisions. Pet. 24-25; *see also Flynn v. Ascension Health Long Term Disability Plan*, 73 F. Supp. 3d 1080, 1083 (E.D. Mo. 2014).

2. And even absent a crisp circuit conflict in the sense of conflicting decisions, there is manifestly a crisp conflict in practice. In the circuits that have not yet addressed the question, religious organizations, relying on long-settled agency rulings, currently operate exempt church plans, regardless of who established the plans. Since this petition was filed, respondents' counsel have entered into settlements that allow hospitals to operate *exempt* from ERISA unless this Court grants review and imposes a church-establishment requirement. Class Action Settlement Agreement § 4.1.4, *Lann v. Trinity Health*, No. 14-cv-02237 (D. Md. Aug. 1, 2016). The Court often waits for a circuit split so as to be sure a conflict is producing differential application of the law. There are no doubts on that score here. As for respondents' contention that "plan sponsors have no contrary authority on which to rely if they choose to continue to treat non-church-established plans as church plans" (Opp. 19), there remains a memorandum from the general counsel of the IRS and over 550 express rulings from the IRS and the DOL, not to mention *Lown*, *Chronister*, countless district court decisions, and respondents' counsel's settlements.

3. The need for uniformity is especially compelling under ERISA. Pet. 25-26. Respondents argue that a church-establishment requirement will create greater uniformity if ERISA, rather than state law, applies more broadly. Opp. 19. But the application of state law where ERISA on its face does not apply hardly undermines ERISA's overarching goal of nationwide uniformity. The problem here is that iden-

tical plans are treated differently *under ERISA*—some covered, some not, depending on the location of the plan.

III. There Is No Church-Establishment Requirement

On the merits, respondents' arguments are contrary to the text and rely on a selective misreading of the legislative history. It is Advocate's view that the statute clearly forecloses a church-establishment requirement, but at a minimum respondents' gymnastics make clear that there is a substantial question this Court should decide. Indeed, when the Seventh Circuit stayed the mandate, it necessarily concluded that there was a "reasonable possibility that five Justices will vote to reverse." *U.S. ex rel. Chandler v. Cook Cty.*, 282 F.3d 448, 450 (7th Cir. 2002).

1. Respondents do not coherently address their interpretation's surplusage problem. Pet. 26-27. Respondents argue that "established" is not superfluous in subparagraph C because subparagraph C "repeats the basic definition of a church plan from sub[paragraph] 33(A)." Opp. 29. That is our point. Because subparagraph C repeats "established," subparagraph C alters the entire "basic definition" of subparagraph A, rather than the maintenance requirement alone. Contrary to respondents' citationless assertion (*id.*), none of the circuit decisions have addressed the surplusage problem. And Congress did not eliminate "established" "altogether" (*id.*), *i.e.* from subparagraph A, because there was no need—plans maintained by churches are established by churches.

Respondents misleadingly state that petitioners "now disavow" a purported concession made by counsel in *Saint Peter's* about a hypothetical statute, and

"now say they have realized" that the hypothetical is slanted. Opp. 30. Neither Advocate nor any of its counsel took any position on that hypothetical before filing this petition. Indeed, the hypothetical first surfaced in this case in the panel's opinion. The hypothetical is slanted and irrelevant. Pet. 27-28.

2. Respondents do not cite a single sentence from the legislative history indicating that Congress wanted to retain a church-establishment requirement. Opp. 30-31. The snippets cited simply state that plans that were established by churches still qualified. Respondents' discussion of Congress's goals in amending the exemption (Opp. 3, 30-32) is incomplete and misleading, and ignores contrary legislative history (Pet. 28-29, 31, 33).

Importantly, respondents acknowledge that the bill's co-sponsor expressed concern that the original definition prevented pension boards—which are not churches—from establishing church plans. Opp. 32. The subsequent textual change that respondents identify (*id.*) was not intended to reinsert a church-establishment requirement but to avoid excluding "mixed plans" (Pet. 30).

3. Respondents' policy arguments are irrelevant to the statutory-interpretation question and meritless. Rejecting a church-establishment requirement would not "advantage" religious hospitals over secular competitors. Opp. 1, 8, 16. Advocate's competitors do not generally offer defined-benefit plans because they are too costly. Pet. 9, 20-21. Respondents describe Advocate as "giant" (Opp. i, 1, 8), but the decision below equally applies to a two-room clinic run exclusively by Catholic sisters.

Respondents contend that a church-establishment requirement would protect plan participants against failures, but fail to explain how or why. Opp. 21-22. Even were churches wealthier than affiliated organizations, a church that "establishes a plan" has no "legal" obligation to fund the plan. Opp. 22. And a church has no greater "moral" obligation (*id.*) than its affiliated religious organizations.

4. Respondents' contention (Opp. 34-35) that the agency interpretation creates a First Amendment problem is frivolous; no court has accepted it. The only constitutional problem springs from respondents' interpretation. Pet. 31-34. Respondents curiously suggest that the presence of constitutional arguments on both sides counsels against granting certiorari under the constitutional avoidance doctrine. Opp. 36. That is not how the doctrine works. If *both* sides contend that the other's position raises constitutional doubt, the issue is unavoidable and highlights the need for this Court's attention.

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Respondents do not ask this Court to solicit the Solicitor General's views, and there is no need. The petition raises a clean, squarely-presented question of statutory interpretation. The delay associated with a CVSG would leave religious hospitals and other religious employers in limbo, not to mention aggravate the enormous settlement pressures associated with class actions seeking billions of dollars.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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